OCT 4 1939

Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 685.

IN THE MATTER OF

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Debtor.*

HOWARD S. PALMER ET ALL.,
Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT.

PAUL A. DEVER,
Attorney General.
EDWARD O. PROCTOR,
Assistant Attorney General.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
The case	1
The issue	2
The facts	3
The railroad lines involved	3
Argument	5
Under Section 77 the bankruptcy court is not vested with power to authorize its trustees to discontinue passenger service on lines which the railroad continues to retain and operate for freight service prior to confirmation of a plan of reorganization approved by the Interstate Commerce Commission	5
Synopsis of Argument	5
1. A railroad holds its franchises from the State subject to the condition that it furnish the public service which was the object of the grant of the franchises. It cannot abandon the public service which was the condition upon which its franchises were granted and still retain them	7
2. Power to permit or deny abandonment of service on intrastate lines is reserved to the several States in the absence of Federal legislation displacing that power. This power is customarily exercised by regulatory commissions. In Massachusetts it is vested in the Department of Public Utilities, subject to judicial review	11
3. Up to the enactment of Section 77 there had been no Federal legislation displacing the States' power to permit or deny partial abandonment of service on lines retained by the railroads, although the Interstate Commerce	

Page

Act conferred on the Commission power to authorize abandonment of lines and complete abandonment of operations 13

4. Section 77 as a whole manifests the clear intent that the Interstate Commerce Commission rather than the bankruptcy court is to be the arbiter as between conflicting interests of the railroad and the public, and that partial abandonment of service is authorized only as a part of the reorganization plan, after having received the Commission's approval 16

5. The general powers conferred by Section 77 upon the bankruptcy court do not embrace authority to oust State regulatory bodies from their jurisdiction to determine what services if any the railroad may abandon, pending confirmation of the reorganization plan 25

Conclusion 34

Appendix 35

Material provisions of the statutes 35

TABLE OF AUTHORITIES CITED.

Atlantic Coast Line v. No. Carolina Corp. Commission, 206 U.S. 1 9, 11

Brotherhood of Locomotive Firemen & Enginemen v. Mobile & Ohio Ry. Co., 362 Ill. 122, 199 N.E. 283 28

Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396 8

Bullock v. Railroad Commission of Florida, 254 U.S. 513 8.

Chesapeake & Ohio Railway Co. v. Public Service Commission of West Virginia, 242 U.S. 603 9, 12

Page

Chicago, Burlington & Quincy Railroad Co. v. Railroad Commission of Wisconsin, 237 U.S. 220 12
Colorado v. United States, 271 U.S. 153 13, 16
Commonwealth v. Felton, 107 Ky. 330, 53 S.W. 1046 28
Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U.S. 648 28, 33
Converse v. Commonwealth of Massachusetts, 101 Fed. (2) 48 2
Crawford v. Duluth Street Railway, 60 Fed. (2) 212 30
Erb v. Morasch, 177 U.S. 584 27
Fort Smith Light & Traction Co. v. Bourland et al., City Commissioners, 267 U.S. 330 8, 12
Gas & Electric Securities Co. v. Manhattan & Queens Track Corp., 253 Fed. 453 27
General Finance Corporation v. New York State Rys., 54 Fed. (2) 1008 27
Gillis v. California, 293 U.S. 62 27
Gulf Colorado & Santa Fe Railway Co. v. State of Texas, 246 U.S. 58 16
Henderson Water Co. v. Corporation Commission, 269 U.S. 278 29
International & Great Northern Ry. Co. v. Anderson County, 246 U.S. 424 27, 32
Iowa v. Old Colony Trust Co., 215 Fed. 307 31
Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734 28
Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588 13, 29
Mercantile Trust Co. v. Tennessee Central R. Co., 286 Fed. 425 27
Mississippi Railroad Commission v. Mobile & Ohio R.R. Co., 244 U.S. 388 12
Missouri Pacific Railway Co. v. Kansas, 216 U.S. 262 10, 12

	Page
Morris & Essex R.R. Co.—Proposed Abandonment, 175 I.C.C. 49	15
Myers v. Bethlehem Corp., 303 U.S. 41	29, 32
New York Electric Lines Co. v. Empire City Subway Co., 235 U.S. 179	7
Pittsburgh & Shawmut Coal Co. v. Delaware & N. R. Co., 289 Fed. 133 (Dist. Ct. N.D. N.Y. 1923)	26
Public Convenience Application of K.C.S. Ry., 94 I.C.C. 691	15
Puget Sound Traction Light & Power Co. v. Reynolds, 244 U.S. 574	11
Railroad Commission of Texas v. Eastern Texas R.R. Co., 264 U.S. 79	8
St. Louis-San Francisco Ry. Co. v. Alabama Public Service Commission, 279 U.S. 560	12, 13
St. Louis & San Francisco Ry. Co. v. Public Service Commission of Missouri, 254 U.S. 535	16
Sullivan v. Hustis, 237 Mass. 441, 130 N.E. 247	28
Transit Commission v. United States, 284 U.S. 360	14, 16
Tyler, In re, 149 U.S. 164	28
United Fuel Gas Co. v. Railroad Commission of Kentucky, 278 U.S. 300	9
United States & Mexican Trust Co. v. Kansas City, M. & O. Ry. Co., 240 Fed. 505	27
Wall v. Platt, 169 Mass. 398, 48 N.E. 270	28
Western & Atlantic R.R. v. Georgia Public Service Commission, 267 U.S. 493	13, 29
Wolff Co. v. Industrial Court, 262 U.S. 522	8

Bankruptcy Act, sec. 77 (11 U.S.C. 205)	1, 2, 5, 7, 13, 16, 18, 23, 25, 33
Bankruptcy Act, sec. 77 (a)	6, 25
Bankruptcy Act, sec. 77 (b) (5)	5, 18
Bankruptcy Act, sec. 77 (c) (2)	6, 25

	Page
Bankruptcy Act, sec. 77 (c) (6)	17
Bankruptcy Act, sec. 77 (d)	6, 19, 34
Bankruptcy Act, sec. 77 (f)	18
Bankruptcy Act, sec. 77 (o)	17n.
Bankruptcy Act, sec. 77B	23
Bankruptcy Act, sec. 77B (e) (2)	23
Bankruptcy Act, sec. 77B (f)	23
74th Congress, House Doc. 89	17n.
76 Cong. Rec. (1933) Pt. 5, p. 5108	19
76 Cong. Rec. (1933) Pt. 5, p. 5110	20
76 Cong. Rec. Pt. 5, p. 5112	24
76 Cong. Rec. Pt. 5, p. 5118-5122	24
76 Cong. Rec. (1933) Pt. 5, p. 5358	20
79 Cong. Rec. (1935) Pt. 12, p. 13301	21
79 Cong. Rec. (1935) Pt. 13, p. 13764	21
79 Cong. Rec. (1935) Pt. 13, p. 13767	21
G.L. (Ter. Ed.) c. 25, § 5	13
G.L. (Ter. Ed.) c. 159, § 16	13
G.L. (Ter. Ed.) c. 160, § 128	13
G.L. (Ter. Ed.) c. 160, §§ 128, 129	13
Interstate Commerce Act, Act Feb. 1920	14, 15
Interstate Commerce Act, Title 49, c. 1	18
Judicial Code, sec. 65	25
11 U.S.C.A. § 205, pp. 1040, 1041	24

Supreme Court of the United States.

October Term, 1938.

No. 685.

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Debtor.*

HOWARD S. PALMER et al.,
Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT.

THE CASE.

The case comes before this Court upon certiorari to the Circuit Court of Appeals for the Second Circuit on the petition of Howard S. Palmer and others, Trustees in operation of the properties of the New York, New Haven and Hartford Railroad Company and of the Old Colony Railroad Company, respectively, in railroad reorganization proceedings under Section 77 of the Bankruptcy Act (11

U.S.C. 205) (R. 109). The petitioners seek to have affirmed an order of the District Court for the Connecticut District authorizing the abandonment of passenger service at eighty-eight Massachusetts stations which was reversed on appeal by the Circuit Court of Appeals (R. 87).

The opinions in the Circuit Court of Appeals are reported *sub nom. Converse* v. *Commonwealth of Massachusetts* in 101 Fed. (2) 48. They appear in the present record at pp. 101-108. The findings and order of the District Court are not in the official reports. They appear in the record at pp. 22-27.

THE ISSUE.

The single question now raised is whether the United States District Court in Connecticut, sitting as a court of bankruptcy in railroad reorganization proceedings under Section 77 of the Bankruptcy Act (11 U.S.C. 205), had authority, prior to adoption of a plan of reorganization, without the concurrence of the Interstate Commerce Commission, to authorize discontinuance of passenger service at stations in Massachusetts upon lines which the debtor railroad continues to operate for freight service, notwithstanding the pendency of proceedings for discontinuance of such passenger service instituted by the trustees of the debtor railroad before the Massachusetts Department of Public Utilities.

THE FACTS.

The facts are adequately stated in the petitioners' brief (Petitioners' Brief, pp. 1-8). The respondent concedes that there was evidence to support the District Judge's primary findings (R. 23-25; Petitioners' Brief, pp. 4, 5) without, however, conceding that his conclusions (R. 25-27; Petitioners' Brief, pp. 5, 6) were in whole justified. The respondent particularly disputes the conclusion that failure to grant the relief asked for would result in confiscation, a conclusion from which the Circuit Court of Appeals itself dissented (R. 103, 104).

The Railroad Lines Involved.

The railroad lines involved are shown on a plan, Exhibit 1 (R. 76A).

The Old Colony Railroad (whose lines are shown in red) consists of approximately 575 miles of road. Its principal lines are from Boston southerly to Braintree, whence there are three branches, one along the South Shore to Plymouth, another *via* Whitman to Plymouth, and a third *via* Middleboro to Buzzards Bay at the entrance to Cape Cod, whence the road has two branches, one extending the entire length of Cape Cod to Provincetown and the other proceeding southerly to Falmouth and Woods Hole. The Old Colony also has lines from Lowell and Fitchburg in northern Massachusetts converging at Framingham Centre and thence proceeding southeasterly to Myricks, whence it branches to Fall River and to New Bedford (R. 44, 45; Exh. 1, R. 76A).

The Boston and Providence Railroad (whose lines are shown in yellow) has fifty-eight miles of line and constitutes the main line of the New York, New Haven and Hartford

system between Boston and Providence (R. 44, 45; Exh. 1, R. 76A).

The New England lines owned by the New Haven Railroad subject to the lien of the New England Railroad Company Consolidated Mortgage (R. 11, par. 1 (a)) (whose lines are shown in green) consist of two segments, one extending from Boston southwesterly through Readville, Franklin and Blackstone to East Douglas, the other originating a short distance east of Boston, passing through Needham Junction and thence southeasterly through Millis and Medway to Unionville (Exh. 1, R. 76A).

The eighty-eight stations at which passenger service is to be discontinued are enumerated in Exhibit B, R. 21. The order contemplates the entire discontinuance of passenger service on the Old Colony lines on Cape Cod east of Yarmouth and on a central segment from Winslows through Wrentham to Adamsdale Junction, and on the New England lines on two segments, one from Boston to Readville and one from Needham Junction to Unionville. Besides these lines which would be entirely abandoned for passenger service there are also numerous other stations at which passenger service will be discontinued although passenger trains will continue to run on the lines.

ARGUMENT.

UNDER SECTION 77 THE BANKRUPTCY COURT IS NOT VESTED WITH POWER TO AUTHORIZE ITS TRUSTEES TO DISCONTINUE PASSENGER SERVICE ON LINES WHICH THE RAILROAD CONTINUES TO RETAIN AND OPERATE FOR FREIGHT SERVICE PRIOR TO CONFIRMATION OF A PLAN OF REORGANIZATION APPROVED BY THE INTERSTATE COMMERCE COMMISSION.

Synopsis of Argument.

Section 77 concededly contains no express grant of power to the bankruptcy court to permit discontinuance or abandonment of public services upon retained lines. The petitioners are obliged to spell out such power from the general provisions of the Act conferring exclusive jurisdiction of the debtor and its property.

The power that is here asserted for the bankruptcy court is in effect the power to amend the railroad's charter. The bankruptcy court under such asserted power assumes to say to the railroad: "You may continue to operate under the franchises which the State has conferred upon you, but you need not perform the conditions upon which they were granted."

This is an extraordinary power, in derogation of the rights of the States and in violation of their charter-contracts. If Congress had intended to confer such power on the bankruptcy court it would doubtless have said so.

Congress did say, on the other hand, that a plan of reorganization may provide for "the amendment of the charter of the debtor" (subsection (b) (5), Appendix, *infra*, pp. 35, 36), and that after the plan is confirmed it shall be carried out notwithstanding orders of State authorities to the contrary (subsection (f), Appendix, *infra*, p. 38), but

this can be authorized only when the plan has first been approved by the Interstate Commerce Commission and certified to the Court (subsection (d), Appendix, *infra*, pp. 37, 38). And this condition is consistent with other provisions of the Act which make the Interstate Commerce Commission throughout rather than the Court the arbiter in questions affecting the conflicting interests of the railroad and the public.

The express terms of the statute, therefore, authorize the amendment of the railroad's charter and the superseding of the State authorities only as they are made an integral part of the plan of reorganization, first approved by the Interstate Commerce Commission.

The general powers conferred upon the Court, giving it jurisdiction of the debtor and its property and providing that its trustees shall have the powers of a trustee in bankruptcy or an equity receiver, are in every instance qualified by the condition that they be exercised consistently with the provisions of the statute (subsections (a) and (c) (2), Appendix, *infra*, pp. 35, 36).

Moreover, the powers of a receiver in equity are limited to the management and operation of the property according to the laws of the State in which it is situated; therefore a trustee with the power of such receiver cannot be authorized by the Court to abandon service on a branch line of a railroad which the State laws and authorities require it to operate.

The Act, therefore, contains neither express nor general language endowing the bankruptcy judge with plenary authority to discontinue unprofitable services while the railroad is in process of reorganization.

In presenting this argument we shall first examine the nature of the railroad's obligation to the State to operate as required by its charter, and the State's control over that obligation in the absence of Federal legislation displacing it; we shall then show that in Section 77 Congress did not vest control over abandonment of service in the bankruptcy court, save only as such abandonment should first receive the approval of the Interstate Commerce Commission as an integral part of the plan of reorganization.

1. A railroad holds its franchises from the State subject to the condition that it furnish the public service which was the object of the grant of the franchises. It cannot abandon the public service which was the condition upon which its franchises were granted and still retain them.

A railroad is a public utility, deriving its powers from the State from which it holds its corporate and secondary franchises. Such franchises, whether in mandatory or permissive terms, require the railroad to transport passengers and property for hire. There is implicit in them a condition that the railroad will furnish the public service which was the object of the grant.

New York Electric Lines Co. v. *Empire City Subway Co.*, 235 U.S. 179, 194:

Hughes, C.J.:

> ". . . it has always been recognized that, as the franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal. . . . It is a tacit condition annexed to grants of franchises that they may be lost by mis-user or non-user. . . ."

A railroad cannot, in the absence of express statutory provision or contract, be compelled by the State to continue operating its system at a loss when there is no reasonable prospect of future profit. If such case the railroad may, without the consent of the State, abandon all its lines within the State and surrender its franchises.

Brooks-Scanlon Co. v. *Railroad Commission of Louisiana*, 251 U.S. 396.

Bullock v. *Railroad Commission of Florida*, 254 U.S. 513.

Railroad Commission of Texas v. *Eastern Texas R.R. Co.*, 264 U.S. 79

Wolff Co. v. *Industrial Court*, 262 U.S. 522, 543:

Taft, C.J.:

"It is true that if operation is impossible without continuous loss . . . it may give up its franchise and enterprise, but *short of this, it must continue.*" (Italics supplied.)

But it has no right to abandon a part of its lines merely because operation thereof will be attended by a pecuniary loss, and still enjoy the privilege of operating its other lines.

Fort Smith Light & Traction Co. v. *Bourland et al., City Commissioners*, 267 U.S. 330, 332, 333:

Brandeis, J.:

". . . A public utility cannot, because of loss, escape obligations voluntarily assumed. . . . A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. . . . So far as appears, this company is at liberty to surrender its franchise and discon-

tinue operations throughout the city. It cannot, in the absence of contract, be compelled to continue to operate its system at a loss. . . . But the Constitution does not confer upon the company the right to continue to enjoy the franchise or indeterminate permit and escape from the burdens incident to its use."

United Fuel Gas Co. v. *Railroad Commission of Kentucky*, 278 U.S. 300, 309:

Stone, J.:

"The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. . . ."

Atlantic Coast Line v. *No. Carolina Corp. Commission*, 206 U.S. 1, 25.

Similarly, it cannot abandon a single service, such as passenger service on a branch line, continuing to operate the line for freight service, merely because the operation of the passenger service will result in a pecuniary loss.

Chesapeake & Ohio Railway Co. v. *Public Service Commission of West Virginia*, 242 U.S. 603, 607:

Van Devanter, J.:

". . . Thus, in legal contemplation, the branch line was devoted to the transportation of passengers as well as of freight, even though actually used only for the latter. An obligation to use it for both was imposed by law, and so could not be thrown off or ex-

tinguished by any act or omission of the railway company. . . .

"One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. . . ."

Missouri Pacific Railway Co. v. *Kansas*, 216 U.S. 262, 277, 279:

White, J. (in sustaining a State order requiring a railroad to run a regular passenger train over its line instead of a mixed passenger and freight train):

". . . The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is, of course; as declared in the *Atlantic Coast Line case* as a general rule, a circumstance to be considered in determining its reasonableness, as are the other criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, *those rights not having been surrendered by the corporation*, other considerations are in the nature of things paramount, since it cannot be said that an order compelling the performance of such duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that

a corporate charter was purely unilateral, that is, was binding in favor of the corporation as to all rights conferred upon it and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. . . ." (Italics supplied.)

And where a railway is being operated as part of a system under different corporate ownerships and franchises, the system as a whole can be compelled to operate the unprofitable service.

Puget Sound Traction Light & Power Co. v. *Reynolds,* 244 U.S. 574, 581.

2. Power to permit or deny abandonment of service on intrastate lines is reserved to the several States in the absence of Federal legislation displacing that power. This power is customarily exercised by regulatory commissions. In Massachusetts it is vested in the Department of Public Utilities, subject to judicial review.

The State which granted the railroad its franchises may of course permit it to abandon part of its lines or a single service, such as passenger service, retaining its lines for freight.

And the State may establish regulatory bodies vested with power to determine what constitutes reasonable service and what lines or service may be abandoned.

Atlantic Coast Line Railroad Co. v. *No. Carolina Corp. Commission,* 206 U.S. 1, 19:

White, J.:

". . . The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their

operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

Mississippi Railroad Commission v. *Mobile & Ohio R.R. Co.*, 244 U.S. 388, 390, 391:

Clarke, J.:

"A State may regulate the conduct of railways within its borders, either directly or through a body charged with the duty and invested with powers requisite to accomplish such regulation. . . :

"Under this power of regulation a State may require carriers to provide reasonable and adequate facilities to serve not only the local necessities but the local convenience of the communities to which they are directly tributary. . . . and such regulation may extend in a proper case to requiring the running of trains in addition to those provided by the carrier, even where this may involve some pecuniary loss. . . ."

Accord:

Missouri Pacific Railway Company v. *Kansas*, 216 U.S. 262, 276, 278, 279.

Chicago, Burlington & Quincy Railroad Co. v. *Railroad Commission of Wisconsin*, 237 U.S. 220, 226, 227.

Chesapeake & Ohio Railway Company v. *Public Service Commission of the State of West Virginia*, 242 U.S. 603, 607, 608.

Fort Smith Light & Traction Co. v. *Bourland et al., City Commissioners*, 267 U.S. 330, 333.

St. Louis-San Francisco Ry. Co. v. *Alabama Public Service Commission*, 279 U.S. 560.

In Massachusetts this power has been vested in the Department of Public Utilities, subject to judicial review. Massachusetts General Laws (Tercentenary Edition) c. 160, §§ 128, 129; c. 159, § 16; c. 25, § 5 (Appendix to this Brief, pp. 44-46).

The statute expressly forbids a railroad to abandon a passenger station without having first obtained the written approval of the Department after notice and a public hearing (§ 128, Appendix, p. 44).

For a State to require such proceedings, and continued operations while they are pending, does not conflict with the due process clause of the fourteenth amendment.

St. Louis-San Francisco Ry. Co. v. *Alabama Public Service Commission*, 279 U.S. 560.

Lawrence v. *St. Louis-San Francisco Ry. Co.*, 274 U.S. 588.

Western & Atlantic R.R. v. *Georgia Public Service Commission*, 267 U.S. 493, 496.

3. Up to the enactment of Section 77 there had been no Federal legislation displacing the States' power to permit or deny partial abandonment of service on lines retained by the railroads, although the Interstate Commerce Act conferred on the Commission power to authorize abandonment of lines and complete abandonment of operations.

Congress, with its paramount power over interstate commerce, has authority to direct the abandonment of intrastate service when its continuance imposes an undue burden on interstate commerce, and even the explicit provisions of the railroad's charter must yield to this authority.

Colorado v. *United States*, 271 U.S. 153, 165:

Brandeis, J.:

"'The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the

State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. . . . But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York* v. *United States*, 257 U.S. 591, 605. Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. . . ."

Transit Commission v. *United States*, 284 U.S. 360, 369.

Congress, however, had not exercised its power over partial discontinuance of service as distinguished from complete abandonment.

The Interstate Commerce Act (Appendix hereto, p. 43), provides:

". . . no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

The Interstate Commerce Commission has repeatedly held that this does not confer upon the Commission power

to authorize partial discontinuance of rail service, such as the abandonment merely of passenger service on a branch line.

Public Convenience Application of K.C.S. Ry., 94 I.C.C. 691, 692:

"With respect to the proposed discontinuance of passenger and regular freight service over the air line and the Sugar Creek line, the record shows that the applicant will continue to operate these lines for intermittent freight service. Under the circumstances we are of the opinion that the proposed partial discontinuance of service is not an abandonment within the meaning of that term as used in paragraph (18) of section 1 of the act and that we are, therefore, without jurisdiction under that section to authorize such partial discontinuance of service. . . ."

Morris & Essex R.R. Co.—Proposed Abandonment, 175 I.C.C. 49, 52:

". . . as stated in our report in *Public Convenience Application of K.C.S. Ry.*, 94 I.C.C. 691, we have no jurisdiction over a partial discontinuance of rail service. Accordingly, the part of this application which covers the proposed abandonment of passenger service and the substitution of busses therefor is not a matter which in itself we are authorized to decide. . . ."

The Act (par. 17, Appendix, p. 43) specifically reserves the right of the States to require reasonable passenger service for intrastate business—

"*Provided, however,* That nothing in this chapter shall impair or affect the right of a State, in the exer-

cise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter."

It is clear, therefore, that under the Interstate Commerce Act the right of the States over partial discontinuance of service as distinguished from complete abandonment remains unimpaired, with the single qualification that the orders of the State commissions may not impose obligations which conflict with the Commission's orders made within its field.

Gulf Colorado & Santa Fe Railway Co. v. *State of Texas*, 246 U.S. 58, 62.

St. Louis & San Francisco Ry. Co. v. *Public Service Commission of Missouri*, 254 U.S. 535.

Colorado v. *United States*, 271 U.S. 153, 165.

Transit Commission v. *United States*, 284 U.S. 360, 369.

4. Section 77 as a whole manifests the clear intent that the Interstate Commerce Commission rather than the bankruptcy court is to be the arbiter as between conflicting interests of the railroad and the public, and that partial abandonment of service is authorized only as a part of the reorganization plan, after having received the Commission's approval.

Section 77 applies solely to railroads engaged in interstate commerce and therefore subject to the provisions of the Interstate Commerce Act.

The section, as we have already stated, contains no express provisions dealing with discontinuance or abandonment of service as such.

As the Act was originally enacted it contained no provisions for sale or abandonment of lines or parts of lines prior to confirmation of the plan of reorganization.

By amendment,* subsection (c) (6) was inserted providing for the operation of leased lines where the lease has been rejected (as the lease of the Old Colony was in the present case). That section provides that if the lessee (in this case the New Haven) elects not to operate the leased line, it shall be the duty of the lessor (the Old Colony) to begin such operation, unless the judge, upon the petition of the lessor, decrees after hearing that it would be impracticable and contrary to the public interest for the lessor to operate it, in which event it shall be the duty of the lessee (the New Haven) to continue operation on or for the account of the lessor "*until the abandonment of such line is authorized by the Commission in accordance with the provisions of section (1) of Title 49*" (Appendix, *infra*, pp. 36, 37). Under this section, therefore, operation of the leased line must be continued until its abandonment is authorized by the Interstate Commerce Commission. While the Court determines as between lessor and lessee which shall operate the road, no authority is given to the Court to say that it shall not be operated.

Also, by amendment, subsection (o) provides that the trustees shall determine what lines or portions of lines and what other property of the railroad, if any, should be abandoned or sold during the pendency of the proceedings without unduly or adversely affecting the public interest, and shall present their petitions to the judge for authority to

*Subsections (c). (6) and (o), here discussed, were added in response to the recommendation of the Federal Co-ordinator of Transportation that "Minor amendments are necessary, designed to facilitate the abandonment of unremunerative branches of service" (74th Congress, House Doc. 89). As the discussion indicates, this recommendation was given effect only in so far as abandonment of service meant outright abandonment or sale of the lines themselves.

abandon or sell such property, whereupon, after hearing, the judge may authorize any such abandonment or sale, "*but only with the approval and authorization of the Commission when required by chapter 1 of Title 49, as amended . . .*" (Appendix, *infra*, pp. 39, 40). So far as this section relates to lines or portions of lines as distinguished from other property of the debtor, approval and authorization of the Commission are required by chapter 1 of Title 49 (the Interstate Commerce Act; Appendix, *infra*, p. 43). Under this section, therefore, the abandonment and sale of lines, carrying with it abandonment of operations, can be authorized by the Court only when first approved and authorized by the Interstate Commerce Commission.

There are no other provisions of the statute having to do with abandonment of lines or operations prior to the confirmation of the plan of reorganization.

Section 77 contains no express provision that even the plan of reorganization may provide for discontinuance of service on retained lines. The section does, however, contain provisions from which it is inferable that the plan of reorganization may make provisions for such discontinuance of service.

So subsection (b) (5) provides that the plan may provide for the retention or the sale of all or any part of the debtor's property, "*the amendment of the charter of the debtor,*" "and may deal with all or any part of the property of the debtor . . . and may include any other appropriate provisions not inconsistent with this section". (Appendix, *infra*, pp. 35, 36). Authority to amend the debtor's charter would seem to embrace authority to provide for the discontinuance of passenger service which the charter requires.

Subsection (f) provides that upon confirmation of the plan it shall be put into effect, "the laws of any State or

the decision or order of any State authority to the contrary notwithstanding" (Appendix, *infra*, p. 38). Then, and then only, under the Act, is the "State authority" superseded.

Assuming this to be so, every plan for reorganization must be submitted to the Interstate Commerce Commission, which shall "hold public hearings, at which opportunity shall be given to any interested party to be heard" and the Commission shall report whether the plan "*will be compatible with the public interest.*" Finally, "*no plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court*" (subsection (d); Appendix, *infra*, pp. 37, 38).

It therefore follows that authority to amend the debtor's charter by relieving it from the obligation to furnish passenger service cannot be exercised by the judge except as it is part of the reorganization plan first approved by the Commission and certified to the Court.

The Congressional debates upon both the original statute and the 1935 amendment support this interpretation of the section.

Senator Hastings of Delaware, 76 Cong. Rec. (1933) Pt. 5, p. 5108:

> "Mr. President, as I said a moment ago, it seemed to me the onl thing left for us seriously to consider is whether or not the public interests are properly protected under the bill. I am quite certain, with all the authority we have given to the Interstate Commerce Commission, whose duty it is, of course, to see to it that the public interests are protected, that we have gone as far as it is possible to go in that direction. It seems

to me it is not possible for any person to complain that under the terms of the bill the public interests are not being properly taken care of."

P. 5110:

"It is urged that in many instances applications made to a court might be made to a judge who has had no experience whatever in railroad matters, but who would be dependent entirely upon interested railroad officials in determining what he should do and whether the plan was a good plan or whether it was not a good plan. I was finally convinced, in order that the public might be made safe always and that other persons interested in the railroad might be made safe, that it was perhaps, after all, a wise thing to submit the plan to the Interstate Commerce Commission. . . ."

Rep. LaGuardia of New York, 76 Cong. Rec. (1933) Pt. 5, p. 5358:

"Of course the law does not go as far as I would like to see it go. I would like to see the entire reorganization taken from the courts and placed in the Interstate Commerce Commission. There is a division of opinion whether we can legally and constitutionally do this . . . We had to submit to the majority views on this question, but we did put the absolute power and the final word—let there be no mistake about this—in the hands of the Interstate Commerce Commission, and have so tied it that the Court cannot amend, can not alter, can not modify a reorganization plan. The approval of the Interstate Commerce Commission of the plan is essential and indispensable."

Rep. McLaughlin of Nebraska, 79 Cong. Rec. (1935) Pt. 12, p. 13301:

> "Perhaps the outstanding beneficial feature of this whole legislation is the protection afforded the public, the railroads, railroad employees, and those interested as holders of railroad securities, by the double check of the necessity of approval of the plan of reorganization by both the Interstate Commerce Commission and the court."

Senator Wheeler of Montana, 79 Cong. Rec. (1935) Pt. 13, p. 13764:

> "Sec. 77 . . . brought the Interstate Commerce Commission into the active development of plans, enabling a proper consideration of the public interest. . . . The Federal judges have been notoriously derelict by reason of their failure to scrutinize reorganization plans."

Senator Hastings of Delaware, 79 Cong. Rec. (1935) Pt. 13, p. 13767:

> ". . . Congress is undoubtedly giving to the courts and to the Interstate Commerce Commission very great power.
>
> "In this particular instance there is a double check. It is necessary to have the approval of the Interstate Commerce Commission and the approval of the district judge before whom the matter is being tried, and then there is always the right of appeal to the circuit court."

It is argued by the petitioners, following the reasoning of the dissenting judge below, that since upon confirmation

of the plan the debtor shall put it into effect "the laws of any State or of decision or order of any State authority to the contrary notwithstanding," it is to be implied that prior to confirmation of the plan the laws of the State and the decisions and orders of its authorities are not controlling (Petitioners' Brief, pp. 12, 13; dissenting opinion below, R. 108). This argument overlooks the essential requirement which we have just discussed, that the Interstate Commerce Commission's approval is a prerequisite to this superseding of the State laws and authorities.

If the judge can discontinue the services prior to submission of the plan to the Interstate Commerce Commission, the Commission will be confronted with a *fait accompli* which clearly Congress did not intend. It was not the purpose of Congress that the judge should present to the Interstate Commerce Commission a body already mutilated.

This is unquestionably the interpretation of the statute which is most compatible with the public interest.

This was clearly realized by the majority judges, who wrote, through Circuit Judge Learned Hand:

> ". . . But we cannot see why, merely because the road may in the end be reorganized, the judge should be able to dispense with those conditions which the state has imposed upon the grant that alone makes lawful any operation of the road whatever. . So to construe the language of subdivisions (c) and (o) is to make him the tribunal to weigh and decide between the conflicting interests of the owners and the public. The notion behind the regulation of public utilities by specially qualified officials is that a judge is not qualified for such duties—at least in the first instance, or until the facts have been sifted and arranged. Assuming that a bankruptcy act might constitutionally

> go that far, only inescapable language could justify our imputing to Congress the intent to confer so extreme and unnecessarily provocative a power. . . ." (R. 105).

The petitioners ask the Court to attach significance to the fact that Section 77B, providing for corporate reorganizations, provides that, if the corporation is a *utility* subject to the jurisdiction of one or more State regulatory bodies, the plan of reorganization shall not be confirmed until such State bodies have given it their approval (Section 77B, subsections (e) (2) and (f); Appendix, *infra*, pp. 40, 41). From this it is argued that Section 77, dealing with railroads, by omitting any mention of the State regulatory bodies, intends to remove the railroads from their jurisdiction both before and after confirmation of the reorganization plan (Petitioners' Brief, pp. 13, 14; dissenting opinion below, R. 107).

To this we reply that Section 77B proceeds on the same theory as Section 77, that in all questions affecting the conflicting interests of the utility and the public the arbiter is to be the board of "specially qualified officials" (majority opinion below, at R. 105), rather than the bankruptcy judge: in the case of an interstate railroad it is the Interstate Commerce Commission; in the case of other public utilities it is the State Commission. In neither case is the bankruptcy judge alone vested with power to abolish or delimit the public service which the utility was chartered to perform.

The petitioners also ask the Court to attach significance to the fact that during the debate in the Senate Senator Hastings of Delaware proposed an amendment providing that "All existing laws relating to railroads or railways engaged in interstate commerce shall be applicable to any trustee appointed and operating a railroad or railway pursuant

to this action" (76 Cong. Rec. Pt. 5, p. 5118) and that subsequently the Senator withdrew his amendment (p. 5112). This, it is argued, proves that Congress intended that a trustee should not be governed by any State laws (Petitioners' Brief, p. 24).

Examination of the debate refutes any such inference. Senator Norris of Nebraska had introduced an amendment providing that no judge or trustee should change the wages or working conditions of employees except as prescribed in the railroad labor act or the memorandum of agreement entered into in Chicago January 31, 1932, between the executives of 21 labor organizations and a committee representing the railroads; that no judge or trustee should require any person seeking employment "to sign the so-called yellow-dog contract," etc. (p. 5118).

Senator Hastings promptly offered his amendment as a substitute (p. 5118) and the debate turned on the question whether the general provisions of the substitute accomplished the purposes of the original (pp. 5118-5122). Senator Norris finally agreed to eliminate the "yellow-dog" expression, which was offensive to Senator Hastings, whereupon the latter withdrew his substitute amendment (p. 5122). Senator Norris's amendment was then adopted (as subsections (o), (p) and (q) [historical note, 11 U.S.C.A. § 205, pp. 1040, 1041]).

Certainly it cannot be argued from this episode that Congress intended to permit the bankruptcy judge to relieve a railroad from the duty of furnishing the service required under its charter as determined by the State Commission.

We conclude, therefore, that the specific provisions of the statute negative any grant of authority to the bankruptcy judge acting alone to authorize the discontinuance of passenger services upon lines which are retained and operated for freight service by the railroad.

5. The general powers conferred by Section 77 upon the bankruptcy court do not embrace authority to oust State regulatory bodies from their jurisdiction to determine what services if any the railroad may abandon, pending confirmation of the reorganization plan.

Section 77 (a) confers upon the court "exclusive jurisdiction of the debtor and its property wherever located," and provides that the court "shall have and may exercise in addition to the powers conferred by this section all the powers, *not inconsistent with this section,* which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose" (Appendix, *infra,* p. 35).

Section 77 (c) (2) provides that the trustees "shall have all the title and shall exercise, subject to the control of the judge and *consistently with the provisions of this section,* all of the powers of a trustee appointed pursuant to section 72 [*i.e.,* a trustee in bankruptcy] or any other section of this title, and, *to the extent not inconsistent with this section,* if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. . . ." (Appendix, *infra,* p. 36).

Congress has therefore restricted every grant of power by the condition, thrice repeated, that its exercise shall not be inconsistent with the other provisions of the statute.

If our conclusion under point (4) (*supra,* p. 24) is sound, then it is "inconsistent with this section" for the court by itself to authorize the trustees to abandon passenger service. Further, the grant of "power *to operate* the business of the debtor" does not connote the power *to cease to operate.*

The power of a receiver in equity proceedings, under the long-settled policy of Congress, as provided by section 65

of the Judicial Code (Appendix, *infra*, p. 42), is limited to management and operation of the property "according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." The majority judges below observed this, stating:

> "The powers of trustees in reorganization are, to some degree at any rate, measured by those of receivers in equity (subd. (e), 11 U.S.C.A. § 205 (c) (2)), and it has been long the settled policy of Congress to subject receivers in their management of the properties in their custody to the laws of the states, § 124 Title 28, U.S. Code, 28 U.S.C.A. § 124. . . ." (R. 105, 106).

This principle that the receiver must comply with the State laws has received frequent application, in one instance in a case exactly in point.

> *Pittsburgh & Shawmut Coal Co.* v. *Delaware & N. R. Co.*, 289 Fed. 133 (Dist. Ct. N.D. N.Y. 1923).

In holding that the court might not authorize its receiver to abandon a branch line of a railroad, Cooper, Dist. J., said, pp. 135, 136:

> ". . . For this court to permit its receiver to abandon this Andes branch, while the remainder of the railroad continues to be operated by the receiver, would be for the court, without the consent of the state, to alter or modify the corporate charter or franchise granted by the state, and to release the railroad from some of its obligations, which turned out to be undesirable and burdensome, while retaining the desirable ones. . . .
>
> "The application must be denied."

International & Great Northern Ry. Co. v. *Anderson County*, 246 U.S. 424.

(Statutory duty to maintain offices at a particular place.)

Erb v. *Morasch*, 177 U.S. 584:

(Regulation of speed of trains within city limits.)

Gillis v. *California*, 293 U.S. 62:

The receiver of a company producing and selling gasoline was held to be bound by a statute requiring a dealer to have a license and give a surety bond for payment of taxes.

Mercantile Trust Co. v. *Tennessee Central R. Co.*, 286 Fed. 425, 427 (Dist. Ct. Tenn. 1922):

(Statute providing that damages resulting from railroad operations should be given priority over mortgages.)

Gas & Electric Securities Co. v. *Manhattan & Queens Track Corp.*, 253 Fed. 453 (Dist. Ct. East. Dist. N.Y. 1918):

(Railroad's franchise fixing maximum rate of fare.)

United States & Mexican Trust Co. v. *Kansas City, M. & O. Ry. Co.*, 240 Fed. 505 (Dist. Ct. D. Kan. 1917):

(State commission's order reducing rates.)

General Finance Corporation v. *New York State Rys.*, 54 Fed. (2) 1008, 1010 (C.C.A. 2d 1932), *semble.*

Commonwealth v. *Felton*, 107 Ky. 330, 53 S.W. 1046:

(Regulation requiring maintenance of toilet facilities in stations.)

Brotherhood of Locomotive Firemen & Enginemen v. *Mobile & Ohio Ry. Co.*, 362 Ill. 122, 199 N.E. 283:

(Regulation requiring maintenance of switch lights.)

Sullivan v. *Hustis*, 237 Mass. 441, 130 N.E. 247:

(Liability for personal injuries for failure to give signals as required by statute.)

Wall v. *Platt*, 169 Mass. 398, 48 N.E. 270:

(Liability for damages caused by fire from locomotive.)

A court of equity, of course, has power to protect the property in its custody from invasion or destruction.

In re Tyler, 149 U.S. 164, 181.
Continental Bank v. *Rock Island Railway Co.*, 294 U.S. 648, 675.
Isaacs v. *Hobbs Tie & Timber Co.*, 282 U.S. 734.

But where the State has provided a regulatory commission vested with authority to determine such matters, and particularly where, as here, the trustees had already invoked its jurisdiction, the court's power to protect the property does not permit it to prevent or forestall the decision of the State commission.

This is the more apparent where, as here, Congress has provided that the Court's decree shall supersede the or-

ders of the State authorities only after confirmation of the plan of reorganization (Brief, *supra*, pp. 18, 19).

The administrative remedy provided by the State cannot be circumvented by holding that the prescribed hearing would result in irreparable damage.

Myers v. *Bethlehem Corp.*, 303 U.S. 41, 50, 51 (and cases cited):

Brandeis, J.:

"... The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . .

"Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. . . ."

Accord:

Lawrence v. *St. Louis-San Francisco Ry. Co.*, 274 U.S. 588, 595.

Western & Atlantic R.R. v. *Georgia Public Service Commission*, 267 U.S. 493, 496.

Henderson Water Co. v. *Corporation Commission*, 269 U.S. 278.

In this principle lies the answer to the reasoning of the dissenting judge below that "The district judge has found that no plan could be confirmed unless the proposed reduction of service were made, and that the failure to grant the relief asked would result in confiscation. These findings are not challenged. Hence, enforcement of an order by the state commission refusing the proposed reduction of service

could be enjoined. . . . Under such circumstances, at least, it would seem reasonable to hold that the court of bankruptcy has jurisdiction to protect the res within its custody by curtailing a confiscatory service" (R. 108).

This reasoning, moreover, overlooks the consideration that the State commission might, while agreeing that the service as a whole would be confiscatory, nevertheless find that a partial or reduced service was required as a matter of public convenience and necessity, the cost of which would not in itself be confiscatory.*

If the State administrative body should in effect abdicate, by refusing to take any action whatever upon the receiver's petition, it might justify the court in taking jurisdiction upon this ground.

Crawford v. *Duluth Street Railway*, 60 Fed. (2) 212 (C.C.A. 7th, 1932), relied upon by the petitioners (Petitioners' Brief, pp. 20, 21) may be so explained (majority opinion below, R. 104).

In that case the receiver of a railway company filed a petition in the District Court for authority to abandon operations on certain branch lines, alleging that he had "presented to the mayor and council [the State regulatory body] his petition for permission to discontinue operations . . . that no action has been taken on the receiver's petition; that the mayor and council do not intend to act on the petition either by granting or refusing it; and that the

---

*The Department of Public Utilities did in fact on July 28, 1938, find that public convenience and necessity require the operation of a gas-electric rail car on all week-days from Yarmouth to Provincetown in the morning and return in the afternoon, stopping for passengers at Yarmouth, South Dennis, Harwich, Brewster, Orleans, Eastham, Wellfleet, North Truro and Provincetown, finding that this limited passenger service does not exceed the financial ability of the carrier, precarious as it is.

Orders with respect to other lines have been withheld, under the terms of the Order of the Circuit Court of Appeals staying the mandate.

effect of the refusal is that the receiver must continue to operate the whole Superior division at a loss unless relieved by the court" (p. 213, first column). The State and city did "not dispute the facts averred in the petition. They seek a reversal solely upon the ground that, upon the admitted facts, the District Court was without authority to authorize the abandonment" (p. 213, second column). It was held that the court had jurisdiction to determine whether "the action of the city council . . . in withholding consent to the abandonment of the branch line [was] arbitrary and unreasonable" (p. 215, par. 5).

The action of the Massachusetts Department of Public Utilities in the case at bar presents no analogous situation (Stipulation, R. 76). As stated in the majority opinion below:

> ". . . However that may be, on July 9, 1938, there was as yet no warrant for saying that the Department had so delayed the proceeding before it as to show that it meant to evade any decision. Respect for it, and for the Commonwealth, required that it should be allowed to proceed as in other cases: only a power in substance the equivalent of the power to issue a writ of prohibition could justify prejudging the merits, however plain they may be" (R. 104):

If the State, instead of providing a regulatory commission, vests authority in the State courts, it may be that the Federal courts exercising concurrent jurisdiction are vested with like authority.

Iowa v. *Old Colony Trust Co.*, 215 Fed. 307 (C.C.A. 8th, 1914), relied upon by the petitioners (Petitioners' Brief, pp. 21, 22, 26), may be so explained (majority opinion below, R. 106).

In that case the State statute provided that a railroad desiring to relocate, change or remove its line should file a petition in the State court. There were mortgage fore-

closure proceedings in which a receiver was appointed in the Federal court. That court permitted its receiver to abandon a part of the road. The majority opinion below in discussing the case said (R. 106):

> ". . . The statutes of Iowa provided a proceeding in a state court for that purpose and the railroad substituted for this an ancillary petition in a foreclosure suit. We assume that the court allowed the road to do this under the doctrine that, when once a court has taken custody of a res, it will draw to itself all litigation touching it. That doctrine may properly be made to cover all litigation cognizable by state courts, even though it concern the fulfillment of charter conditions. It is of the essence of the jurisdiction for diverse citizenship that federal courts shall be deemed the equivalent of state. But when the state has set up a specialized tribunal, not judicial, at all, the federal court is not a substitute for it, and may not displace it."

But see, defending the state court's jurisdiction:

> *International & Great Northern Ry. Co.* v. *Anderson County*, 246 U.S. 424, 431.
>
> Cf. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50, 51 (quoted Brief, *supra*, p. 29).

The petitioners also argue that the accumulation of the deficit during the pendency of reorganization proceedings would itself result in confiscation and prevent the reorganization of the railroad, upon the findings of the bankruptcy judge (R. 25, 26), and that for this reason the court had jurisdiction to make the order.

The failure of the evidence and findings to support such a drastic conclusion was noted in the majority opinion below (R. 103, 104):

> ". . . We could feel some force in this argument, if

the judge had found that it would defeat any plan which could be devised to let the deficit accumulate during the period while the Department might be considering the case, and while its order, if unfavorable, was being reviewed. But he did not so find: all he said was that no plan could go through which did not cut off the service in question; and that is quite different from saying that an added indebtedness at the rate of $660,000 a year, for what could scarcely be more than a year, would balk all possible plans. That is most unlikely, and if the trustees meant to assert it, they should have proved it. Nothing in the testimony of the expert, Cunningham, went so far; nor did the finding that 'the emergency now existing on these lines will not permit of the delay and uncertainty inherent in such a programme.' "

If there existed danger of confiscation from continuous operating losses, it was attributable not to the delay of the Department of Public Utilities in hearing the trustees' petition, but to the inability of the trustees to formulate, with the promptitude contemplated by Congress, an acceptable reorganization plan.

One of the main purposes of Section 77 was to provide a method for expeditious reorganization.

Continental Illinois National Bank & Trust Co. v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 685:

Sutherland, J.:

"The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; . . . Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the

duty of the court and of the Interstate Commerce Commission to see that they do. . . ."

By amendment, subsection (d) provided that the debtor should file its plan of reorganization within six months of the approval of the petition as properly filed, "and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months" (Appendix, *infra*, p. 37).

The New Haven Railroad has been in reorganization proceedings since October 3, 1935, a period of four years. Congress clearly did not contemplate that a railroad should be operated for four years or more under the benevolent protectorate of a bankruptcy judge, endowed with plenary authority to discontinue unprofitable services.

We conclude, therefore, that the powers conferred upon the bankruptcy court do not embrace authority to oust the Massachusetts Department of Public Utilities from its jurisdiction already invoked by the trustees to determine what services, if any, the railroad may abandon, prior to confirmation of a reorganization plan providing for such abandonment with the approval of the Interstate Commerce Commission.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Second Circuit should be affirmed and its mandate, hitherto stayed, issue to the District Court of Connecticut.

COMMONWEALTH OF MASSACHUSETTS,
PAUL A. DEVER,
Attorney General,
EDWARD O. PROCTOR,
Assistant Attorney General.

Appendix.

MATERIAL PROVISIONS OF THE STATUTES.

UNITED STATES STATUTES.

Section 77(a) of the Bankruptcy Act, 11 U.S.C.A. §205(a):

"* * * If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. * * *"

Section 77(b), 11 U.S.C.A. §205(b):

"A plan of reorganization within the meaning of this section * * * (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alter-

ation of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

Section 77(c)(2), 11 U.S.C.A. §205(c)(2):

"* * * The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. * * *"

Section 77(c)(6), 11 U.S.C.A. §205(c)(6):

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said

line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49."

Section 77(d), 11 U.S.C.A. §205(d):

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than ten per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than ten per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the require-

ments of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

"The Commission may, thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

Section 77(f), 11 U.S.C.A. §205(f):

"* * * Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding * * *."

Section 77(j), 11 U.S.C.A. §205(j):

"In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after

final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree * * *."

Section 77(l), 11 U.S.C.A. §205 (l):

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Section 77(o), 11 U.S.C.A. §205(o):

"The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization, but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by chapter 1 of Title 49, as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale

in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. * * *"

Section 2 of the Bankruptcy Act, 11 U.S.C.A. §11:

"The courts of bankruptcy as defined in the previous chapter, namely, the district courts of the United States in the several States, * * * are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as established on July 1, 1898, or as they may be thereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they were on July 1, 1898, or may be thereafter held, to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; * * *"

Section 77B(e)(2) of the Bankruptcy Act, 11 U.S.C.A. §207(e)(2):

"In case the debtor is a utility subject to the jurisdiction of a regulatory commission or commissions or other regulatory authority or authorities, created by the laws of the State or States in which the properties of the debtor are operated, a plan of reorganization shall not be confirmed until (a) it shall be submitted to each such commission or authority having regulatory jurisdiction over the debtor, (b) an opportunity shall be afforded each such commission or authority to suggest amendments or objections to the plan; and

(c) the judge shall consider such amendments or objections at a hearing at which each such commission or authority may be heard. In case the debtor is a public utility corporation wholly intrastate in character no court shall approve any plan of reorganization if the regulatory commission of such State having jurisdiction over such public utility certifies that the public interest is affected by said plan, unless said regulatory commission shall first approve of said plan as to the public interest therein and the fairness thereof. If said regulatory commission shall not within thirty days or such additional period as the court may prescribe after the submission of a plan to it file said certificate it shall be deemed that the public interest is not affected by said plan."

Section 77B(f) of the Bankruptcy Act, 11 U.S.C.A. §207(f):

"After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that * * * (7) the debtor, and every other corporation, issuing securities or acquiring property under the plan, is authorized by its charter or by applicable State or Federal laws, upon confirmation of the plan, to take all action necessary to carry out the plan, and that, in case the debtor is a utility corporation subject to the jurisdiction of a regulatory commission or commissions or other regulatory authority or authorities, created by the laws of the State or States in which the properties of the debtor are operated, all authorizations, approvals, or consents of each such commission or authority required by the laws of such State or States, have been obtained."

Section 65 of the Judicial Code, 28 U.S.C.A. §124:

"Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

Section 66 of the Judicial Code, 28 U.S.C.A. §125:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Section 265 of the Judicial Code, 28 U.S.C.A. §379:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The Interstate Commerce Act, Act Feb. 1920, c. 91; 41 Stat. 474, §1 as amended, 49 U.S.C.A. §1:

"(17) * * * *Provided, however,* That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter."

"(18) * * * *abandonment of lines; certificate required.*—* * * no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) *Application for certificate of commission; notice and hearing.*—The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which * * * all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates."

Section 128 of chapter 160 of the Massachusetts General Laws (Ter. Ed.):

> "A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station, unless it is relocated under the following section, nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the department after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon."

Section 129 of chapter 160 of the Massachusetts General Laws (Ter. Ed.):

> "A railroad corporation may relocate passenger stations and freight depots, with the written approval of the department and of the board of aldermen of the city or the selectmen of the town where such stations or depots are situated."

Section 16 of chapter 159 of the Massachusetts General Laws (Ter. Ed.):

"If the department is of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the department shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby. The department may after such a hearing, order any railway company to build and operate any just and reasonable extensions of its lines for which it may have been or may be granted locations and order from time to time that a railroad company shall operate its lines, of standard gauge, or such parts thereof as the department shall prescribe, by electric power instead of steam power, and in its order shall prescribe the time within which the work of electrification shall be done. Before making such order, the department shall consider the relative importance and necessity of the changes in any specific regulations, practices, equipment and appliances proposed to be included therein and of other changes which may be brought to its attention in the course of the hearing, the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith, upon its financial ability to make such other changes, if any, as may be deemed by the department of equal or greater importance and necessity in the performance of the service which the carrier has professed to render

to the public. Every such common carrier shall obey every requirement of every such order so served upon it, and do everything necessary or proper in order to secure absolute compliance with every such order by all its officers, agents and employees."

Section 5 of chapter 25 of the Massachusetts General Laws (Ter. Ed.):

"When so requested by any party interested, the commission, or any member or members acting for the commission, shall rule upon any question of substantive law properly arising in the course of any proceedings before the commission or any member or members thereof, and any party in interest aggrieved by such ruling may object thereto, and may secure a review thereof as hereinafter provided. Any failure or refusal of the commission, or of any member or members thereof acting for the commission, to rule upon such a question at the request of any party in interest as aforesaid within ten days after such request, shall be taken and recorded as a ruling adverse to the party requesting the ruling.

"The supreme judicial court shall have jurisdiction in equity to review, modify, amend or annul any ruling or order of the commission, or of any member or members representing the commission, but only to the extent of the unlawfulness of such ruling or order * * *."